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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 696

CITY OF MIAMI BEACH, a Municipal Corporation of the State of Florida,

Petitioner,

vs.

VICTOR H. KUGEL and FAYE E. KUGEL, his wife,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Florida, and to the Third District Court of Appeal of Florida.

[redacted] OF PETITIONER

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TABLE OF CONTENTS

	Page
Statement of Grounds for Jurisdiction	2
Constitutional Provisions, Statutes and Ordinances Involved	3
Statement of the Case	3
Procedural History of the Case	3
Question Presented	5
How Federal Question Was Presented	6
Argument: Reason For Granting Writ of Certiorari	6
Conclusion	11
Certificate of Service	12
Appendix	App. 1

TABLE OF CASES

	Page
City of Miami v. Zorovich, 195 So.2d 31 (Fla.App. 1967)	10
City of Miami Beach v. Kugel, 212 So.2d 877 (Fla. 1968)	2
City of Saginaw v. Consumers' Power Co., 213 Mich. 460, 182 N.W. 146	11
Federal Radio Commission v. Nelson Brothers, etc. Co., 289 U.S. 266	8
Kugel v. City of Miami Beach, 206 So.2d 282 (3rd Dist. Fla. 1968)	2
Muncie Natural Gas Co. v. City of Muncie, 160 Ind. 97, 66 N.E. 436	11
Pepper v. Pepper, 66 So.2d 280 (Fla.)	8
Radice v. New York, 264 U.S. 292	10
State of Alabama v. State of Texas, 347 U.S. 272	8
State of Rhode island v. State of Louisiana, 347 U.S. 950	8
Village of Euclid v. Amber Realty Company, 272 U.S. 365	5

TABLE OF AUTHORITIES

Statutes	**Page**
U.S. Const., Fourteenth Amendment	3
28 U.S. Code, Sec. 1257(3)	2
City of Miami Beach Zoning Enabling Act, Chap. 9837, Spec. Acts, 1923, Laws of Florida	3
City of Miami Beach Ordinance No. 289	3

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Petitioner,

vs.

VICTOR H. KUGEL and FAYE E. KUGEL, his wife,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Florida, and to the Third District Court of Appeal of Florida.

BRIEF OF PETITIONER

The Petitioner, City of Miami Beach, is a municipal corporation of the State of Florida, created by Special Act of the Legislature. It prays that this Court issue its Writ of Certiorari to the Supreme Court of the State of Florida, or to the Third District Court of Appeal of the State of Florida, to review the Final Judgment or Decree of the latter Court entered on January 23, 1968, and to review the Order of the Florida Supreme Court entered on June

12, 1968 denying the Petition of the City of Miami Beach for a Writ of Certiorari to the Third District Court of Appeal of the State of Florida.

Petition for Rehearing was denied by the Florida Supreme Court on July 24, 1968.

The Final Decree of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, In and For Dade County, is reported officially, the decree is set forth in full in the Appendix hereto.

The Judgment or Decree of the Third District Court of Appeal of the State of Florida reversing the Decree of the Circuit Court is reported officially in 206 So. 2d 282.

The Order of the Florida Supreme Court denying the Petition of the City of Miami Beach for Writ of Certiorari was without opinion and is reported officially in 212 So. 2d, 877.

STATEMENT OF GROUNDS FOR JURISDICTION

The Order of the Florida Supreme Court denying the Petition of the City of Miami Beach for Writ of Certiorari was made and entered on June 12, 1968. The Florida Supreme Court made and entered its Order Denying Petition for Rehearing on July 24, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3), because the Petitioner, its citizens, residents and taxpayers, have been deprived of due process of law and denied the equal protection of the law under the Fourteenth Amendment to the United States Consti-

tution by state action through the decisions and judgments of the Florida Supreme Court, and of the Third District Court of Appeal of the State of Florida, agencies of the State of Florida.

The decisions on which review is sought were rendered by the highest Courts of the State. All appellate remedies of the State Courts have been exhausted.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

The Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

Zoning Enabling Act for the City of Miami Beach, Chapter 9837, Special Acts, 1923, Laws of Florida.

Ordinance Number 289, of the City of Miami Beach, commonly known as the "Zoning Ordinance of Miami Beach, Florida".

STATEMENT OF THE CASE

Procedural History of the Case:

Victor H. Kugel and Faye E. Kugel, his wife, hereinafter called the "Respondents", filed a Suit in Chancery in the Circuit Court of the Eleventh Judicial Circuit, In the State of Florida, In and For Dade County, against your Petitioner, the City of Miami Beach, to:

1. "Adjudicate that (its property) shall be rezoned "BAA" according to the Zoning Code of the City of Miami Beach, that said property . . . may be used for commercial business by its owners."

2. "That this Court adjudicate that the "RE" classification is invalid, void, unreasonable, arbitrary, and unconstitutional as applied to Plaintiffs' property, and has no reasonable relationship to public health, safety, morals and welfare, and that the property shall be rezoned to "BAA".

Your Petitioner filed its Answer to the Complaint, denying all material allegations of the Complaint, and asserted that the Respondents were praying "for a decree whereby the Court would be required to substitute its judgment for that of the City Council of the City of Miami Beach."

At the final hearing, the Circuit Court heard the evidence adduced by the respective parties and thereafter entered its Final Decree (Appendix, Page 1) upholding the constitutional validity of the ordinance involved, and denying all the relief prayed by the Respondents.

Respondents thereupon appealed to the Third District Court of Appeal of the State of Florida. Thereafter said Court entered its Opinion and Judgment reversing the Decree of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida in and for Dade County (Appendix, Page 3), holding:

(1) "The zoning of appellants' (Respondents') property is arbitrary and unreasonable and the same amounts

to unconstitutional regulation of appellants' (Respondents') property."

(2) That "the present case does not come within the bounds of this rule (i.e., the 'fairly debatable rule') ..."

The Petitioner, City of Miami Beach, thereupon petitioned the Florida Supreme Court for its Writ of Certiorari to the Third District Court of Appeal of Florida.

On June 12, 1968, the Florida Supreme Court entered its Order Denying said Petition. On July 24, 1968, the Florida Supreme denied the Petition of the City of Miami Beach for Rehearing.

QUESTION PRESENTED

Is the failure of the Courts of a State to correctly apply the "fairly debatable rule" in zoning cases as established by this Court in **Village of Euclid v. Amber Realty Company**, 272 U.S. 365, an unconstitutional encroachment by the judiciary into the legislative powers of the City of Miami Beach, and a deprivation of the rights of your Petitioner, its residents, citizens and taxpayers of their rights under the Fourteenth Amendment of the Constitution of the United States?

HOW FEDERAL QUESTION WAS PRESENTED

The Federal question was raised in these proceedings by Petitioner's Petition for Rehearing, the pertinent portion of which reads as follows:

"This Court overlooked and failed to consider that the Petitioner, its citizens, residents and taxpayers have been deprived of due process of law and denied the equal protection of the law under the 14th Amendment to the United States Constitution by this Court's denial of certiorari to review the decision of the District Court below."

Said Petition for Rehearing was denied by the Florida Supreme Court on July 24, 1968.

REASON FOR GRANTING WRIT OF CERTIORARI

I. The Challenged Decrees of the Third District Court of Appeal of the State of Florida Violate the Fourteenth Amendment to the United States Constitution.

II. The Reversal by the Third District Court of Appeal Of the State of Florida, of the Decrees of the Circuit Court of the Eleventh Judicial Circuit of the State of Florida, In and For Dade County, Constitutes a Deprivation of the Rights of the Petitioner, its Residents, Citizens and Taxpayers, under the United States Constitution, and Deprives Them of the Due Process of Law Guaranteed by the Fourteenth Amendment.

Under the provision of Chapter 9837, Special Acts 1923, Laws of Florida, the Legislature provided:

"For the purpose of promoting health, safety, morals and the general welfare of the City of

> Miami Beach, **the City Council of said City** . . . be and it is hereby empowered to regulate and restrict . . . the location and use of buildings, structures and land for trade, industry, residential or other purposes."
>
> For any or all of such purposes, **it** (the City Council) may divide the municipality into districts of such number, shape and area as may best suit and carry out the purposes of this Act . . ."
>
> "**The City Council** shall provide for the manner in which such regulations and restrictions, and the boundaries of such districts shall be determined, established and enforced, and from time to time, amend, supplement, or change . . ."

In accordance with these powers so granted, the City Council duly enacted its Zoning Ordinance No. 289. By the terms of this Zoning Ordinance, the Respondents' property was placed in an Apartment and Hotel Use District. The City Council selected Seventeenth Street as being the line separating the Apartment and Hotel Use District in which Respondents' property lies, from the Business Use District lying to the south.

The Circuit Court correctly held:

> "it to be axiomatic that a line has to be drawn in every zoning ordinance. The Court further finds and determines that the line drawn by the City Council in the City Zoning Ordinance setting 17th Street as being the line of demarcation

> between the business uses to the south and the residential uses to the north of said street to be based on reason and that the Plaintiffs have failed to demonstrate that the fixing of said line is arbitrary or capricious."

The Third District Court of Appeal of the State of Florida, reversed this decree. It said:

> "A final decree for the Defendant, City, was entered by the chancellor after a full hearing. We think it implicit in his holding that he found some equity in the complaint but determined that under the rules of law applicable to zoning cases, he ought not grant relief."

Such action by the Third District Court of Appeal of the State of Florida constitutes an unconstitutional encroachment by the judiciary into the legislative powers of the City Council of the City of Miami Beach and deprives the Petitioner, its residents, citizens and taxpayers, of the rights guaranteed to them under the Fourteenth Amendment to the United States Constitution.

This Court has held that the judiciary may not encroach upon, or interfere with, the proper exercise of the constitutional powers of the Legislature. **State of Alabama v. State of Texas**, 347 U.S. 272; **State of Rhode Island v. State of Louisiana**, 347 U.S. 950; **Federal Radio Commission v. Nelson Brothers, etc. Co.**, 289 U.S. 266.

This doctrine was also enunciated by the Florida Supreme Court, but not applied herein, when it said, in the case of **Pepper v. Pepper**, 66 So.2d, 280, at 284:

"The courts have been diligent in striking down acts of the Legislature which encroached upon the Judicial or the Executive Departments of the Government. They have been firm in preventing the encroachment by the Executive Department upon the Legislative or Judicial Departments of the Government. The Courts should be just as diligent, indeed, more so, to safeguard the powers vested in the Legislature from encroachment by the Judicial branch of the Government.

"The separation of governmental power was considered essential in the very beginning of our Government, and the importance of the preservation of the three departments, each separate from and independent of the other becomes more important and more manifest with the passing years. Experience has shown the wisdom of this separation. If the Judicial Department of the Government can take over the Legislative powers, there is no reason why it cannot also take over the Executive powers; and in the end, all powers of the Government would be vested in one body. Recorded history shows that such encroachments ultimately result in tyranny, in despotism, and in destruction of constitutional processes.

"The Judicial Department is not concerned with the wisdom of such legislation as that involved in the present litigation."

The Petitioner, City of Miami Beach, also asserted in the Third District Court of Appeal of Florida, as follows:

> "Appellee also suggests that this Court should treat the residential zoning of appellants' property as an exercise of the legislative authority of the city council, and that as such, it falls under the fairly debatable rule adhered to by this Court in the **City of Miami v. Zorovich**, Fla.App. 1967, 195 So.2d 31."

This Court, in Village of Euclid v. Ambler Realty Company, 272 U.S. 365, said:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control. **Radice v. New York**, 264 US 292, 294."

The "fairly debatable rule" has become virtually a rule of property. The alteration of zoning boundaries lines inevitably results in material and substantial changes in property values. Unfortunately, the increment to one property owner is gained only as a consequence of the damage to the adjoining property. Such is the case here. The enhancement to the Respondents' property by rezoning it from Apartment or Hotel Use to Office and Store Use is gained only as the result of immeasurable damage to the entire Use District which remains residential.

The failure of the Third District Court of Appeal of the State of Florida to apply the "fairly debatable rule" deprives the affected citizens, residents and taxpayers of the City of Miami Beach of a valuable property right guaranteed to them by the United States Constitution, and is one which may not be taken away without due process of law.

The City of Miami Beach is not only authorized and empowered to assert its property right for and on behalf of its citizens, residents and taxpayers, but is, intended, under a causitive duty, so to do.

As stated in **Muncie Natural Gas Co. v. City of Muncie,** 160 Ind. 97, 66 N.E. 436, at 438:

> "... it may be affirmed that it is not necessary to show that the City has itself sustained damage when it sues for the benefit of its inhabitants, but that it is enough to show that the act tends to injure the public of the municipality." See also, **City of Saginaw v. Consumers' Power Co.,** 213 Mich. 460, 182 N.W. 146 at 154.

CONCLUSION

The Legislature of the State of Florida vested the City Council of the City of Miami Beach with the exclusive power and adjudication to fix, by legislative enactment, the lines or boundaries which define and separate the various uses to which land in the City may be put. This power was duly and properly exercised by the City Council. Notwithstanding, the Third District Court of Appeal of Florida usurped this power by attempting to nullify and erase the legislative lines drawn by the City Council. This is an unconstitutional usurpation of the legislative power of the City Council and this action should be set aside and annulled.

Respectfully submitted,

CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of the foregoing Brief of Petitioner was mailed this _____ day of October, 1968 to Milton E. Grusmark, Esq. and Natalie Baskin, Esq. 1674 Meridian Avenue, Miami Beach, Florida, and to Martin Greenbaum, Esq. 407 Lincoln Road, Miami Beach, Florida.

By _____

APPENDIX

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA IN CHANCERY

NO. 66C-4536 (Judge Wiseheart)

VICTOR H. KUGEL and FAYE A. KUGEL, his wife,

Plaintiffs,

vs.

CITY OF MIAMI BEACH, a Florida municipal corporation,

Defendant.

FINAL DECREE

THIS CAUSE came on to be heard before the Court upon Final Hearing of the issues made by the pleadings herein. The Court has heard the testimony of the witnesses, and has considered the same together with the various exhibits introduced in evidence, and thereafter has heard and considered argument of counsel.

The Court now being fully advised in the premises considers it to be axiomatic that a line has to be drawn in every zoning ordinance. The Court further finds and determines that the line drawn by the City Council in the City Zoning Ordinance setting 17th Street as being the line of demarcation between the business uses to the south and the residential uses to the north of said street to be based on reason and that the Plaintiffs have failed to demonstrate that the fixing of said line is arbitrary or capricious.

WHEREUPON IT IS CONSIDERED, ORDERED AND ADJUDGED that this cause be and the same is hereby dismissed with prejudice to the Plaintiffs, and it is further

CONSIDERED, ORDERED AND ADJUDGED that the Court retains jurisdiction of this cause for the purpose of taxing costs against the Defendant.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this _____ day of December, 1966.

MARSHALL C. WISEHEART

CIRCUIT JUDGE

Not final until time expires to file rehearing petition and, if filed, disposed of.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1968
CASE NO. 67-137

VICTOR H. KUGEL, and FAYE A. KUGEL, his wife,
Appellants,

vs.

CITY OF MIAMI BEACH, a Florida municipal corporation,
Appellee.

Opinion filed January 23, 1968.

An Appeal from the Circuit Court for Dade County, Marshall C. Wiseheart, Judge.

Milton E. Grusmark, Natalie Baskin and Martin Greenbaum, for appellants.

Joseph A. Wanick, City Attorney, for appellee.

Before PEARSON, BARKDULL and SWANN, JJ.

PEARSON, Judge.

The appellants, Victor and Faye Kugel, are the owners of a corner lot on the northwest corner of 17th Street and Meridian Avenue in Miami Beach, Florida.

They appeal a final decree which denied relief upon their complaint that the City of Miami Beach zoning ordinance, restricting them to a residential use of their property, was so restrictive as to be unconstitutional. A final decree for the Defendant, City, was entered by the chancellor after a full hearing. We think it implicit in his holding that he found some equity in the complaint but determined that under the rules of law applicable to zoning cases, he ought not grant relief. The decree found as follows:

> "The Court now being fully advised in the premises considers it to be axiomatic that a line has to be drawn in every zoning ordinance. The Court further finds and determines that the line drawn by the City Council in the City Zoning Ordinance setting 17th Street as being the line of demarcation between the business uses to the south and the residential uses to the north of said street to be based on reason and that the Plaintiffs have failed to demonstrate that the fixing of said line is arbitrary or capricious."

Appellants' complaint alleged that the "R.E." classification of the property is arbitrary, void, unreasonable, discriminatory and unconstitutional by reason of the fact that

> "7. The immediate area of this property is bordered as follows: on the south, which runs parallel to 17th Street, three office buildings within a BAAA business district, these buildings are located on Meridian Ave. and are described as follows:

1674 Meridian Ave. 4 stories

1680 Meridian Ave. 6 stories

1688 Meridian Ave. 9 stories

On the immediate east is Meridian Avenue, however, north of the Plaintiffs' property, the entire area is zoned RE. Directly east of the Plaintiffs' property, across the street, is a bank and office building, which office building has rented offices to other than those connected with the bank and therefore must be classified in either BAA or BAAA zoning classification. To the southeast of Plaintiffs' property is Burdine's Department Store, which has within it both BAA and BAAA zoning classification. This entire eastern area is bordered by the Miami Beach Convention Hall Complex, which is 329 feet from the Plaintiffs' eastern boundaries. Southeast of this property is the Off Street Parking Facilities which has facilities for 2,763 cars. 500 feet south of Plaintiffs' property is the Lincoln Road Mall, which is zoned BAA, and between the Lincoln Road Mall and Plaintiffs' property south boundary are additional Off Street Parking Facilities."

A review of the record convinces us that the uncontroverted facts support the allegations as to the geography of appellants' property. On this appeal we are presented with the question of whether such restrictive zoning, as that alleged in the complaint and proved in the record, can be justified upon the ground that a line must be drawn

somewhere and that since the legislative authority has drawn that line, the courts ought not change it.

Appellants' property has a 62½ foot frontage on the east side of Meridian Avenue and 150 feet on the north side of 17th Street, Miami Beach, Florida. When the present zoning classification was changed from single family to multiple family residence in 1952, the 17th Street neighborhood was quiet and relatively secluded. Since that time the City of Miami Beach has built a large auditorium and convention facility upon a neighboring land which is zoned for residential use. This complex is just east of appellants' property. In addition, the City has closed Lincoln Road (16th Street), which was a main thoroughfare. The result is that 17th Street has become one of the main east-west thoroughfares in the City. Further, by a change in zoning laws, the City has allowed a federal savings and loan association to build an office building on the corner immediately across Meridian Avenue from appellants' property. The office building is on property zoned residential but is used for business. The changes in the area have resulted in a large concentration of non-residential activity in a residential area.

Where changed conditions create a situation where the zoning of appellants' property is so unreasonable as to constitute a taking of his property, then the courts are justified in striking down the arbitrary zoning classification.

The Supreme Court of Florida set out the applicable rezoning in Burritt v. Harris, Fla.App.1965, 172 So.2d 820 at 823:

> "The constitutional right of the owner of property to make legitimate use of his lands may not be curtailed by unreasonable restrictions under the guise of police power. The owner will not be required to sacrifice his rights absent a substantial need for restrictions in the interest of public health, morals, safety or welfare. If the zoning restriction exceeds the bounds of necessity for the public welfare, as, in our opinion, do the restrictions controverted here, they must be stricken as an unconstitutional invasion of property rights".

We hold that the zoning of appellants' property is arbitrary and unreasonable and the same amounts to confiscatory regulation of appellants' property. See Tolius v. City of Miami, Fla.1957, 96 So.2d 122; Burritt v. Harris, supra; Lawley v. Town of Golfview, Fla.App.1965, 174 So.2d 767; Shearer v. Metropolitan Dade County, Fla. App.1966, 189 So.2d 501; Root v. City of South Miami, Fla.App. 1966, 193 So.2d 207. The trial judge was in error when he failed to grant appellants' relief.

The appellee-City urges that appellants are estopped by their own action from claiming relief under the facts alleged in the complaint. The record reveals that appellants acquired their property in 1946 as their home and in 1957 obtained a zoning variance which authorized one of the appellants, Dr. Victor H. Kugel, to practice medicine from an office in the building. The building has been used partly as a doctor's office since that time. It is urged that the doctrine of estoppel set out in Josephson v. Autrey, Fla.1957, 96 So.2d 784, and Servatt v. Dade County, Fla. App.1965, 173 So.2d 175 bars appellants from relief; that

is, the appellants, having received a variance thus affirm the ordinance and may not question the validity of the ordinance as it applies to their property. This principle canot be applied to the present action because appellants' variance was secured in 1957, more than ten years ago, when conditions upon Miami Beach and in this neighborhood were totally different from the present situation. It would make inequitable the equitable doctrine of estoppel to hold, that having applied for a variance in a quiet residential area, the appellees are estopped from presenting to the court facts which established that their residential property has, by the action of the City, been isolated by the erection of tall buildings and parking lots. We hold that appellants are not estopped by the existence of the variance.

Appellee also suggests that this Court should treat the residential zoning of appellants' property as an exercise of the legislative authority of the city council, and that as such, it falls under the fairly debatable rule adhered to by this Court in the City of Miami v. Zorovich, Fla.App.1967, 195 So.2d 31. In that case, we held that zoning regulations which promote the integrity of a neighborhood and preserve its residential character are related to general welfare of the community and are a valid exercise of the legislative power. See also Parking Facilities v. Miami Beach, Fla.1956, 88 So.2d 141; City of Miami Beach v. Wiessen, Fla.1956, 86 So.2d 442. The present case does not come within the bounds of this rule because the record clearly reveals that to change the residential zoning of appallants' property will in no way act to destroy the integrity of a neighborhood. The character of the property has already been changed by other actions of the municipality. The zoning regulation in question, as applied to

appellants' property, is arbitrary and unreasonable and cannot be characterized as "fairly debatable."

We therefore hold that appellants are entitled to relief under the allegations of the complaint. The cause is remanded for a decree in accordance with this holding.

Reversed and remanded.

IN THE SUPREME COURT OF FLORIDA
CASE NO. 37,291

CITY OF MIAMI BEACH, a municipal corporation,
Petitioner,

vs.

VICTOR H. KUGEL and FAYE A. KUGEL, his wife,
Respondents.

PETITION FOR REHEARING

The Petitioner, CITY OF MIAMI BEACH, a municipal corporation, respectfully petitions this Court for a Rehearing of this cause, and for grounds therefor says:

* * *

7. This Court overlooked and failed to consider that the Petitioner, its citizens, residents and taxpayers have been deprived of due process of law and denied the equal protection of the law under the 14th Amendment to the United States Constitution by this Court's denial of certiorari to review the decision of the District Court below.

IN THE SUPREME COURT OF FLORIDA

Case No. 37,291

CITY OF MIAMI BEACH,

Petitioner,

vs.

VICTOR A. KUGEL, et al.,

Respondents.

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.
A true copy,

Test: /s/ Sid J. White,
Clerk, Supreme Court

(I have today mailed to the Clerk of the District Court of Appeal, Third District, Order of June 12, 1968, in the above cause)

SUPREME COURT, U. S.

NOV 21 1968

JOHN F. DAVIS, CLERK

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Introductory Statement	1
Statement of the Case and Facts	2
Question Presented	4
Argument	5
Conclusion	8
Certificate of Service	9

TABLE OF AUTHORITIES

Case	Page
Federal Radio Commission v. Nelson Brothers, etc., Co., 289 U.S. 266	6
Pepper v. Pepper 66 So.2d, 280 at 284	6
State of Alabama v. State of Texas 347 U.S. 272	6
State of Rhode Island v. State of Louisiana 347 U.S. 950	6
Village of Euclid v. Amber Realty Company 272 U.S. 365	6, 7
Florida Appellate Rule 3.14	5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 696

CITY OF MIAMI BEACH,
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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

Respondents were Plaintiffs in Trial Court and Appellants in District Court of Appeal, Third District, State of Florida, and Respondents in the Supreme Court of the State of Florida.

The symbol T represents the Transcript in the Circuit Court.

STATEMENT OF THE CASE AND FACTS

The City Council of Miami Beach on April 13, 1966, denied Respondents' request to re-zone Respondents' property at the Northwest corner of Meridian Avenue and 17th Street, Miami Beach, Florida, from RE (Multiple family use) to BAA (Business use). Respondents' further alleged that RE classification of their property exceeded the bounds of necessity, was detrimental, arbitrary and unconstitutional, and lacked a substantial relation to proper health, morals, safety and welfare.

The neighborhood surrounding Respondents' property includes the following:

South:	Bordered by three (3) office buildings in BAAA district (commercial use district).
North:	Re zoning
East:	Bank and office building (commercial use district).
Southeast:	Burdines Department Store (commercial use district).
East:	Miami Beach Convention Hall complex with Southeast portion providing off-street parking facilities for approximately 2,763 cars.
South:	Off-street parking facilities for Lincoln Road Mall. BAA, (commercial use district).

Historically, as the community grew to the North, the use district under the zoning ordinances of the City of Miami Beach was changed to conform to the economic progress of the community. The area had changed so dramatically, that it became apparent that by the closing of Lincoln Road into a pedestrian mall, the character of 17th Street, which is one of the major east-west vehicular arteries, became, for all practical purposes, a commercial area, and by granting variances and by the zoning changes granted by the city to the property on 17th Street, the city reconstructed the neighborhood into a commercial area.

Testimony at trial disclosed that changes occurred during the preceding ten (10) years, including construction of the Lincoln Road Mall, off-street parking facilities to the North of the Lincoln Road Mall, construction of the convention hall complex, and conversion of 17th Street to a main artery of traffic.

Testimony disclosed that changes had occurred in the neighborhood in 1952 and 1955 and that traffic had increased to at least ten (10) times its former volume on 17th Street since the construction of the Lincoln Road Mall. (T. 71, 72, 169). Testimony also indicated that only a commercial building would be beneficial to the owners of the property. (T. 144).

Testimony (T. 80, 81, 90, 91, 92) showed that commercial use existed, including professional offices of lawyers and C.P.A.s, under RE zoning directly across the street. (T. 159). Testimony also disclosed that an office building would not be more obnoxious or detrimental to the area than a public utility building, and would be better than

an apartment house as far as parking was concerned. In addition, Testimony (T. 240) disclosed that the office building across the street did not have any adverse affect on the area.

The commercial use of its property by the Washington Federal Savings and Loan Association presented a clear-cut example of the effect of Respondents' proposed use since it is located across the street and is similarly situated with respect to surrounding zoning. The Washington Federal Savings and Loan Association's commercial use asserts a positive statement that no negative impact would result.

The Trial Court denied Respondents relief. On appeal, the District Court of Appeal, Third District, reversed the decision of the lower Court. (Decision of the District Court of Appeal, Third District, App. 3).

The Petitioners then petitioned the Supreme Court of the State of Florida for issuance of its Writ of Certiorari. The Florida Supreme Court denied Petitioner's petition. The Petitioners then petitioned the Florida Supreme Court for rehearing and for the first time, raised the provisions of the Fourteenth Amendment to the United States Constitution. This petition was denied. The Petitioners now petition this August Body for its Writ of Certiorari.

QUESTION PRESENTED

HAS THE PETITIONER AT ANY TIME IN THE PROCEEDINGS IN THE LOWER COURT PRESENTED ANY FEDERAL QUESTIONS OR PRESERVED ANY FEDERAL QUESTION TO INVOKE THE JURISDICTION OF THIS COURT?

ARGUMENT

The first and only instance in which the Petitioner has raised a question of equal protection of the law under the Fourteenth Amendment to the United States Constitution was in a Petition for Rehearing of the denial of the Florida Supreme Court to grant Certiorari, and that said Petition for Rehearing brought into play questions that were not raised in any of the lower Courts, and as such, by the Florida Rules of Appellate Procedure, could not be raised in the Supreme Court. Florida Appellate Rules, Rule 3.14,

> " . . . The Petition for Rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted, and must set forth concisely, and without argument, the alleged omissions, oversight, causes or grounds on which it is based".

The Petitioner has set forth as his only grounds for jurisdiction " . . . violation of the Fourteenth Amendment to the United States Constitution".

That the Petitioner's grounds for jurisdiction are without merit, can be ascertained by his failure or inability on either ground to set forth what right under the Fourteenth Amendment he is being deprived of and his inability or failure to set forth in explicit terms, how the challenged decree violated the Fourteenth Amendment. In his second ground on page six, in which he alleged that he has been deprived of due process of law, he does not state in any terms, by any showing whatsoever, of how,

why, when or where, the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, the District Court of Appeal, Third District, State of Florida, and the Supreme Court of the State of Florida, have in any way deprived him of due process.

The Petitioner cites, *State of Alabama v. State of Texas*, 347 U.S. 272; *State of Rhode Island v. State of Louisiana*, 347 U.S. 950; *Federal Radio Commission v. Nelson Brothers, etc., Co.*, 289 U.S. 266 and *Pepper v. Pepper*, 66 So.2d, 280 at 284, implies to this Court that these cases hold that the Judiciary may not set aside within its exercise of constitutional powers, acts improperly exercised by the legislature. The Judiciary has not only the power, but the obligation and duty to set aside and vacate the improper exercise of power by the legislature. The law is so settled in this regard, that it would be an unnecessary exercise to cite case law to this effect.

The case cited by the Petitioner as to the alleged conflict with the law enunciated by the United States Supreme Court is the case of *Village of Euclid v. Amber Realty Company*, 272 U.S. 365, the facts show that the Respondent in that particular case, by injunctive procedures, attacked the entire comprehensive zoning law enacted by the municipality. It held in that circumstance, that the Respondent could not attack the entire comprehensive zoning law, but could attack the law as it applied to Respondent's particular premises.

The Petitioner urges upon this Court that the "fairly debatable rule" as enunciated by this Court in *Village of Euclid v. Amber Realty Company*, 272 U.S. 365, was not considered. Page 10 of the Petition, recites that the District Court of Appeal failed to apply the "fairly debatable rule". Page 8 & 9 App. The opinion of the District Court of Appeal states,

> " . . . the character of the property has already been changed by other actions *of the municipality* (emphasis ours). The zoning regulation in question, as applied to appellant's property, is arbitrary, unreasonable and cannot be characterized as 'fairly debatable'."

Consequently, the District Court of Appeal held and considered the question presented before this Court and found for the Respondent on the identical question presented before this Court.

The Supreme Court of the State of Florida answered the identical question presented by the Petitioner in his Petition for Certiorari and twice decided per curiam, that the "fairly debatable rule" was, and had been properly resolved by the District Court of Appeal.

All other cases cited by the Petitioner are completely without merit and relevancy to this matter.

CONCLUSION

It is apparent that there is no conflict in case law between the law in the State of Florida as enunciated in the District Court of Appeal and the Supreme Court of the State of Florida and the question cited by the Petitioner, and it is apparent also from the record, that the Petitioner had been exposed to the majesty of the law and has not been deprived of any right under the due process provision of the Fourteenth Amendment or any other provision thereunder.

Respectfully submitted,

MARTIN GREENBAUM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari has been furnished to Raphael Steinhardt, Esq., Penthouse Suite, Concord Building, 66 W. Flagler Street, Miami, Florida 33130, and Joseph A. Wanick, Esq., and Ira M. Elegant, Esq., 1130 Washington Avenue, Miami Beach, Florida, 33139, Attorneys for Petitioner, this ____ day of November, 1968, by regular United States Mail.

MARTIN GREENBAUM